Consolidation Coal Company *and* International Union, United Mine Workers of America. Case 14-CA-14761

February 25, 1982

DECISION AND ORDER

BY MEMBERS JENKINS, ZIMMERMAN, AND HUNTER

On August 25, 1981, Administrative Law Judge John C. Miller issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief, and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Consolidation Coal Company, St. Louis, Missouri, its officers, agents, successors, and assigns, shall take the action set forth in said recommended Order, except that the attached notice is substituted for that of the Administrative Law Judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT promulgate, maintain, and publicize an investment plan for our employees which excludes from participation therein otherwise eligible employees who become members of a collective-bargaining unit and who subsequently become subject to the terms of a collective-bargaining agreement.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL amend the investment plan by eliminating the provision which by its terms excludes from participation therein otherwise eligible employees who become subject to the terms of a collective-bargaining agreement.

CONSOLIDATION COAL COMPANY

DECISION

STATEMENT OF THE CASE

JOHN C. MILLER, Administrative Law Judge: This case arose upon the filing of a charge on March 2, 1981, by the International Union, United Mine Workers of America. The complaint issued on March 18, 1981, and a brief hearing was held before me in St. Louis, Missouri, on Thursday, May 14, 1981. After opening the hearing, the parties agreed to submit a joint stipulation, designated herein as Joint Exhibit 1, entered into on March 13, 1981. This Joint Exhibit contains a four-page stipulation of facts, signed by the parties, as well as the formal documents and exhibits. The complaint alleges that from January 16, 1981, to date Respondent has interfered with, restrained, and coerced its employees in the exercise of their Section 7 rights by promulgating, maintaining, and publicizing an Investment Plan which excludes employees, who are otherwise eligible, from participating in the Plan if they become members of a collective-bargaining unit and subsequently become subject to the terms of a collective-bargaining agreement. The issue simply posed is whether Respondent, by maintaining and calling employee attention to this Plan, had violated Section 8(a)(1) of the Act, in that employees are not eligible to participate in the Plan if they select the Union as their bargaining representative.

Upon due consideration of the entire record, including the stipulations, exhibits, and briefs of the parties, I make the following:

FINDINGS OF FACT

I. JURISDICTION

Respondent is a corporation duly authorized to do business under the laws of the State of Illinois. Respondent has maintained the mine facility at Route 3 in the city of DuQuoin, Illinois, and has been engaged therein in the mining and nonretail sale of coal. That facility is the only one involved in this proceeding. During the last 12 months, Respondent, in the course and conduct of its business operations, sold and distributed and/or caused to be distributed, from its DuQuoin, Illinois, facility to points located outside the State of Illinois, goods valued in excess of $50,000. On the basis of these admitted facts, I find that Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

The Charging Party, International Union, United Mine Workers of America, is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Stipulated Facts*[1]

At all times material herein, Mine Superintendent Roger Gann has been and is now a supervisor of Respondent and its agents, within the meaning of Section 2(11) of the Act.

Since on or about January 6, 1981, and continuing to date, Respondent has promulgated and maintained an Investment Plan which excludes from participation herein, in its definition of "Employee," "any person whose conditions of employment are established under collective bargaining agreements entered into between Consolidation Coal Company and the Union which represents them." Said Investment Plan is attached as Exhibit 1 and incorporated herein by reference.

On or about December 29, 1980, Respondent, through Roger Gann, mine superintendent for its DuQuoin facility, the only facility involved herein, sent a letter to salaried employees of said facility, which they received on or about the same date, wherein statements concerning said employee participation in the Investment Plan were made. A representative copy of said letter is attached as Exhibit 2 and incorporated by reference herein.

On or about January 2, 1981, Respondent, through Roger Gann, mine superintendent for its DuQuoin facility, the only facility involved herein, sent a letter to salaried employees of said facility, which they received on or about the same date, wherein statements concerning said employee participation in certain benefits programs were made. A representative copy of said letter is attached as Exhibit 3 and incorporated by reference herein.

On or about March 3, 1981, Respondent, through Roger Gann, the mine superintendent of its DuQuoin, Illinois facility, the only facility involved herein, issued a notice to salaried employees concerning their continued participation in its Investment Plan, which they received on or about the same date. Said notice is attached as Exhibit 4 and incorporated herein by reference.

B. *Additional Facts*

Exhibit 2, part of Joint Exhibit 1, is a two-page letter dated December 29, 1981, from mine superintendent Roger Gann which was sent to individual employees. This letter sets out a number of arguments on behalf of the employer and was designed to persuade employees to vote against union representation. Relevant paragraphs of the letter read as follows:

> The basic fringe benefit program that you already have (medical and life insurance, and retirement) are equal to and in most cases better than the benefits provided to the UMWA-represented employees. I am enclosing a comparison of these plans for your review.
>
> But more significantly, you currently have at least two fringe benefits which are either unavailable to UMWA-represented employees or are vastly superior to theirs. The Investment Plan, which you are already familiar with, is available *only* to salaried employees. The other is your salary continuance plan, which provides benefits that far exceed the UMWA-represented employee's sickness and accident benefits. An employee represented by the UMWA, with the same length of service as you, would receive up to $1,960, if he or she were to become disabled. As a salaried employee you would receive up to $7,050 in salary continuance, plus up to $355,320 in additional long term disability benefits. You will have to agree that this disability plan is an excellent form of insurance, and as such, is extremely valuable to you and your family.

The letter also includes attachments which compared benefits of hourly UMWA-represented employees with those of salaried employees. Under a heading entitled "Investment Plan," the attachment lists "none" for hourly UMWA-represented employees. However, under salaried employees it states: "The salaried employee can contribute up to 12 percent of their monthly salary and [Respondent] will match their first 6 percent of contributions." Joint Exhibits 1 and 2. There is no allegation, contention, or statement in the stipulation that indicates any misrepresentation either in the above-mentioned letter or its accompanying attachments. I, therefore, assume that all statements made in the letter and attachments are true as stated.

The stipulation includes another two-page letter sent to employees by Mine Superintendent Gann on January 2, 1981, designated as Exhibit 3 to Joint Exhibit 1. The letter sets forth obligations imposed on individuals who are union members, including subjects such as strikes, dues, initiation fees, assessments and fines. The first paragraph of the letter refers to the December 29 letter as follows:

> In an earlier letter, I discussed the benefits available to you as a salaried employee of Consol as compared to benefits available to UMWA-represented employees. Do not be misled into thinking that the benefits provided by the National Wage Agreement are the same benefits you will receive if the UMWA should win this election. If you select the UMWA to represent you, all benefits and wages you may receive would have to be negotiated with Consol in a collective bargaining agreement.

Exhibit 4 to Joint Exhibit 1 is an interoffice memorandum, dated March 3, 1981, from Mine Superintendent Gann to selected employees involved in the election. The memo advised that the National Labor Relations Board was to conduct a rerun election on Friday, March 6, 1981. The memo then continued as follows:

> Just so there is no confusion on anyone's part, should the Union be elected to represent you, I would like to advise you that those who wish to participate in the Investment Plan would be permitted to continue in the Investment Plan unless or until an impasse in bargaining occurs over this issue. And the definition of the "employee" contained in the Plan will be revised if necessary.

[1] Jt. Exh. 1, pars. 9-13.

The memo then concluded with Respondent's expressed hope that the employee would vote "No" on March 6.

C. *Legal Issue Posed*

The issue to be resolved is whether Respondent has violated Section 8(a)(1) of the Act in one of two ways. First, whether maintenance of an Investment Plan containing a provision which excludes from participation "any person whose conditions of employment are established under collective bargaining agreements entered into between [Respondent] and the union which represents them" is unlawful *per se* under Section 8(a)(1). Second, if maintenance of this Plan and its exclusion is not unlawful *per se*, whether it is unlawful *per quod*, under these facts, for Respondent to publicize both the Plan and exclusion to potentially affected employees immediately prior to a Board election.

D. *Legal Precedent*

Board law in this area is clear. Consistently, the Board has held that "an employee benefit plan which restricts coverage to unrepresented employees is *per se* violative of Section 8(a)(1) of the Act, regardless of whether the employer adds to the misconduct by implementing the restriction or exploiting it during an organizing campaign." *Niagara Wires, Inc.*, 240 NLRB 1326, 1328 (1979). This principle has been applied to pension and retirement plans[2] and to profit-sharing plans,[3] and has resulted in finding unlawful *per se* the inclusion of a provision which makes lack of union representation one of the qualifications for eligibility to participate in the plans.

The finding of an 8(a)(1) violation by the Board does not, as Respondent suggests, hinge on a showing that the exclusionary provision has been enforced or that employees actually lost benefits because of it.[4] Nor does independent evidence of animus need to be found.[5] Respondent's maintenance and continuance of the exclusionary provision in the Investment Plan, in and of itself tends to interfere with, restrain, and coerce employees in the exercise of their self-organizational rights. By calling employees attention to the exclusion and intimating in its December 29 letter to its employees, that a loss of benefits could follow the choice of the union as their representative, all within a month of a Board-conducted election, Respondent has capitalized on an unlawful provision and has multiplied the impact stemming from an existing coercive condition.[6]

On the basis of the foregoing, I find that Respondent, by promulgating, maintaining, and publicizing an Investment Plan which excludes union represented employees from participation therein, has violated Section 8(a)(1) of the Act.

CONCLUSIONS OF LAW

1. Respondent Consolidation Coal Company is and was at all material times herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Charging Party, International Union of the United Mine Workers of America, is and was at all material times herein a labor organization within the meaning of Section 2(5) of the Act.
3. By promulgating, maintaining, and publicizing its Investment Plan which excludes union-represented employees, Respondent violated Section 8(a)(1) of the Act.
4. The aforesaid practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent engaged in unfair labor practices in violation of Section 8(a)(1), I recommend that Respondent be ordered to cease and desist from its unlawful practices, and that it be ordered to post an appropriate notice and take affirmative action in order to effectuate the policies of the Act.

Specifically, having found that Respondent continues to maintain a provision in its Investment Plan which by its terms unlawfully excludes from participation therein otherwise eligible employees who become subject to a collective-bargaining agreement, I recommend that Respondent amend the Investment Plan so as to clearly eliminate the unlawful eligibility restriction.

Upon the basis of the foregoing findings of fact and conclusions of law, and pursuant to Section 10(c) of the Act, I recommend the issuance of the following:

ORDER[7]

The Respondent, Consolidation Coal Company, Du-Quoin, Illinois, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Promulgating, maintaining, and publicizing an Investment Plan for its employees which excludes from participation therein otherwise eligible employees who become members of a collective-bargaining unit and who subsequently become subject to the terms of a collective-bargaining agreement.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Amend its Investment Plan by eliminating therefrom the provision which by its terms excludes from par-

[2] *Jim O'Donnell, Inc.*, 123 NLRB 1639 (1959); *Firestone Synthetic Fibers Company*, 157 NLRB 1014 (1966), enforcement denied 374 F.2d 211 (4th Cir. 1967); *Niagara Wires, Inc.*, 240 NLRB 1326 (1979).

[3] *Melville Confections, Inc.*, 142 NLRB 1334 (1963), enfd. 327 F.2d 689 (7th Cir. 1964), cert. denied 377 U.S. 933; *Dura Corporation*, 156 NLRB 285 (1965), enfd. 380 F.2d 970 (6th Cir. 1967); *Sunshine Food Markets, Inc.*, 174 NLRB 497 (1969).

[4] *Niagara Wires, Inc.*, 240 NLRB at 1328; see *American Sunroof Corporation*, 248 NLRB 748, 749, fn. 12 (1980).

[5] *Melville Confections, Inc.*, 142 NLRB at 1338; *Dura Corporation*, 156 NLRB at 288.

[6] *Firestone Synthetic Fibers Company*, 157 NLRB 1014 at 1019.

[7] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

ticipation therein otherwise eligible employees who become subject to the terms of a collective-bargaining agreement.

(b) Post at its plant located in DuQuoin, Illinois, copies of the attached notice marked "Appendix."[8] Copies of said notice, on forms provided by the Regional Director for Region 14, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 14, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

[8] In the event that this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."